No. 82-1167

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1167

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents repeatedly state that the DEA agents "exceeded the scope" of the private search (Resp. Br. 16; see also *id.* at 7, 17, 22, 24-25; Am. Br. 2).[1] It is of course true that the agents took actions that the Federal Express employees had not already taken; but it does not follow that the agents' actions are subject to scrutiny under the Fourth Amendment. "If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5.

Our central submission is that once a substance has lawfully come into the possession of law enforcement authorities, an analysis of its chemical composition does not invade

[1] "Am. Br." refers to the Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae.

any privacy interest that is entitled to protection. Respondents do not even attempt to explain why a person might have a legitimate interest in keeping the chemical composition of a substance secret.

Indeed, as respondents appear to recognize, an innocent person would "ship[] lawful substances such as sugar, talcum powder or baking soda via contract carrier" only "by reason of mental deficiency, paranoia, eccentricity" or some similar peculiarity (Resp. Br. 13). It would then require a further measure of eccentricity for a person to feel that his privacy was invaded when the authorities, having lawfully come into possession of the substance, discovered that it was indeed talcum powder and not baking soda. The point of the Court's repeated injunction that the Fourth Amendment protects only *reasonable* expectations of privacy is precisely that the Amendment cannot be read to apply to such thoroughly eccentric privacy interests that may, in fact, not be held by anyone.[2]

2. This Court's decisions in *Illinois* v. *Andreas, supra*, and *United States* v. *Place*, No. 81-1617 (June 20, 1983), both issued since our opening brief was filed, further confirm that the DEA agents here did not conduct a search within the meaning of the Fourth Amendment. In *Place*, the

---

[2]As we said in our opening brief (U.S. Br. 19), every other court of appeals has either held or assumed that the chemical testing of a substance lawfully in the possession of the authorities is not a search. The cases cited by respondents (Br. 20-21) are not to the contrary. In *United States* v. *Johns*, 707 F.2d 1093 (9th Cir. 1983), *United States* v. *Rivera*, 654 F.2d 1048 (5th Cir. 1981), and *United States* v. *Taheri*, 648 F.2d 598 (9th Cir. 1981), the courts held the opening of containers to be an illegal search; they did not suggest that subsequent testing was an additional search. In *United States* v. *Newton*, 510 F.2d 1149 (7th Cir. 1975), the issue was whether government agents were so far implicated in the private opening of a suitcase as to make the action a government search; far from suggesting that subsequent chemical testing of a substance found in the suitcase might be another search, the court appeared to assume that it was not. *Cash* v. *Williams*, 455 F.2d 1227 (6th Cir. 1972), did not involve a chemical analysis at all.

Court ruled that a sniff by a trained narcotics dog is not a search because it is "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure" (slip op. 11). Like a dog sniff, a chemical analysis "tells the authorities something about the contents of" a container, but "the information obtained is limited" (*ibid.*). Indeed, as we explained in our opening brief (U.S. Br. 14-16), the field test at issue here, exactly like a dog sniff,"disclose[d] only the presence or absence of narcotics, a contraband item" (*Place*, slip op. 10-11).

It is true that a chemical analysis, unlike a dog sniff, can generally be conducted only after the container holding the suspicious substance has been opened. But here the initial opening of the package — the intrusion that revealed the suspicious powder inside a transparent container — was conducted, as respondents concede, by private parties. This intrusion into the package therefore did not violate the Fourth Amendment. See also *Illinois* v. *Andreas*, slip op. 3 n. 1 ("Common carriers have a common law right to inspect packages they accept for shipment, based on their duty to refrain from carrying contraband.").[3] The agents then opened the transparent container and removed a few particles of the suspicious substance. Even if this action constituted a seizure—and we believe it did not (see U.S. Br. 24-25)—it is abundantly clear that removing such items from inside a transparent container does not violate the Fourth Amendment (*Illinois* v. *Andreas*, slip op. 6; citations omitted):

---

[3]After our opening brief was filed, a former Federal Express employee told a DEA agent that Federal Express employees made false statements under oath at the suppression hearing and the trial in this case. When we learned this information, we promptly relayed it to respondents' counsel and sent him a copy of the DEA agent's report. We are also lodging a copy of that report with the Court.

The former employee alleged that Federal Express employees opened the package containing cocaine not because it was damaged in shipment but because they were suspicious of it. Even if this allegation were true,

> The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity. The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost * * *.

Respondents' contention that the agents' actions constituted a search within the meaning of the Fourth Amendment is, therefore, insubstantial.

---

it would in no way affect the issue before this Court. The former Federal Express employee did not allege, and respondents have never contended, that the government was involved in the Federal Express search. Under *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), a purely private search does not implicate the Fourth Amendment even if it is tortious. See also *Illinois* v. *Andreas*, slip op. 3-4 n.2 ("When common carriers discover contraband in packages entrusted to their care, it is routine for them to notify the appropriate authorities. The arrival of police on the scene to confirm the presence of contraband and to determine what to do with it does not convert the private search by the carrier into a government search subject to the Fourth Amendment."). And the former employee's allegations, assuming they are true, would not even establish that the private search was tortious. See *Illinois* v. *Andreas*, slip op. 3 n.1.

The former employee did not suggest that the government was in any way aware that Federal Express employees were testifying falsely. In addition, we would note that some of the circumstances recounted in the agent's report cast doubt on the credibility of the former employee's statements. While respondents are free to raise any issues relating to these allegations on remand, there is no reason for the allegations to deflect this Court from considering the question on which it granted certiorari; that question obviously has practical implications for law enforcement that far transcend this particular case.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11